

**RESPONSE OF MARCI BURDICK TO SENATOR GRASSLEY’S WRITTEN
QUESTIONS FOR SENATE JUDICIARY COMMITTEE HEARING
“REAUTHORIZATION OF THE SATELLITE TELEVISION EXTENSION AND
LOCALISM ACT,” MARCH 26, 2014**

What are your views on how the video marketplace has changed since Congress last authorized STELA? What has happened in terms of technology, competition and pricing for consumers?

Enhanced technology and increased competition in the video marketplace calls into question whether the Section 119 distant signal license should be allowed to sunset as originally intended by Congress. When Congress first enacted the satellite distant signal license, it was seen as a temporary mechanism to assist a fledgling satellite industry. Yet, here we are 25 years later debating whether to extend it for the *fifth* time for the second and third largest multichannel video programming distributors (MVPDs) with 34 million subscribers and billions of dollars of revenue.

Experience has shown that the Section 122 local-into-local compulsory license is the right way to address delivery of over-the-air television stations to satellite subscribers. Local-into-local has been a boon to the satellite industry and greatly enhanced its ability to compete with cable. In fact, DISH now offers local-into-local in all 210 designated market areas (DMAs) and DirecTV is now offering local service in 195 markets. This license also has promoted localism—the bedrock principle rooted in the Communications Act of 1934. Indeed, Congress chose to include “localism” in the very title of the 2010 satellite reauthorization.

In contrast, the distant signal license has long outlived its usefulness. While satellite companies are in the best position to identify precisely the number of their subscribers currently receiving distant signals, in 2009 when STELA was under consideration, only some two percent of households continued to receive a distant signal package, and that was before DISH began providing local-to-local in all markets. For this and other reasons, that number is steadily declining. Moreover, the marketplace has changed dramatically since 1988 when the big dish back-yard satellite industry was just getting started and even since the mid-1990s when DISH and DirecTV first launched small-receiver services.

What is the proper role for Congress in responding to marketplace disputes in the communications industry?

Retransmission consent operates as an economically efficient marketplace vehicle by which local broadcasters and MVPDs can arrange for broadcast signals to be delivered to MVPD subscribers. No Congressional involvement in this process is warranted.

The free market negotiations enabled by the retransmission consent right are no different than any other relationship between a wholesaler and a retailer. The government would not think of demanding that Nike be forced to sell its shoes to Amazon, or even require CNN to provide its programming to a cable provider. Indeed, MVPDs themselves find forced carriage rules

anathema. For example, while actively urging the Federal Communications Commission (FCC) to impose mandatory interim carriage requirements on broadcasters, Time Warner Cable (TWC) has waged a court battle opposing FCC rules requiring carriage of cable network programming pending the outcome of program carriage complaints. Similarly, in response to an NFL proposal for arbitration in connection with negotiations for carriage of the NFL Network, then TWC CEO Glen Britt stated that, “[w]e continue to believe that the best way to achieve results is to privately seek a resolution and not attempt to negotiate through the press or elected officials.”¹

It’s been reported that incidents of television programming blackouts have been steadily increasing, from 12 blackouts in 2010 to over 100 blackouts in 2013. What do you believe is causing this trend? Is this evidence of a system that is broken, or just a function of the free market?

DISH, DirecTV, and Time Warner Cable, are responsible for roughly 90 percent of the disruptions experienced by consumers over the last two years. If you remove these three companies from the mix, the retransmission consent framework is achieving the result Congress envisioned when it adopted the law in 1992. So the answer to what is causing the increased number of disruptions is that the pay-TV industry – led by DISH, DirecTV, and Time Warner Cable – has attempted to manufacture a crisis in order to force government intervention in the retransmission consent marketplace.

Another reason for the increased disruptions is that retransmission consent negotiations have become much more complex, because MVPDs are demanding that broadcasters relinquish rights allowing MVPDs to transmit their programming on multiple platforms. These demands would diminish broadcasters’ ability to negotiate with other platforms to enable them to provide competition with MVPDs.

Yet another reason for increased disruptions, especially with respect to DISH, is that DISH has commenced a service that illegally deletes commercials only on network programming.

The calls from the pay-TV industry to expand the narrow examination of STELA to “reform” retransmission consent are designed to do one thing only: give them unfair leverage in negotiations and therefore undermine broadcasters’ ability to provide their communities with high-value content.

The truth is that the fees paid to broadcasters remain modest compared to those paid to cable networks.² The dual revenue streams that stations recover from advertising revenues and

¹ Cablevision Removes 2 Channels from Time Warner in Fee Dispute, Bloomberg.com (Mar. 8, 2005); NFL Offers Arbitration to Cable for NFL Network, USA TODAY (Dec. 20, 2007) (Quoting Glenn Britt, Chief Executive Officer of Time Warner Cable).

² Contrary to what some suggest, NAB has demonstrated across numerous economic studies that retransmission consent payments are not responsible for high and rising pay-TV prices. Just two cents of every cable bill dollar goes to broadcast retransmission consent fees. That is true in spite of the fact that during the 2011-2012 television season, 96 of the top 100 most watched prime time programs were aired by broadcast TV stations.

retransmission consent fees are the reason the broadcasting industry has been able to continue to serve its communities of license, including by making investments in local journalism and news, entertainment, weather, and public affairs programming. In fact, according to the latest RTNDA/Hofstra University Annual Survey, 27,605 hardworking American's populated local TV newsrooms. The average U.S. daily newspaper now has 27.5 news staffers while the average local TV news staff is at 38.5.³

Despite claims made by those in the pay-TV industry, it is the extremely rare occurrence where marketplace negotiations result in any interruptions in MVPD distribution of broadcast signals. Carriage disruptions from retransmission consent impasses represent only one-hundredth of one percent of annual U.S. television viewing hours. That means consumers are twenty times more likely to lose television programming because of a power outage or rainy skies (in the case of a DBS subscriber) than a retransmission consent dispute. Local broadcasters and pay-TV providers both have an incentive to complete retransmission consent negotiations and for that simple reason they almost always do — before any disruption to viewers occurs.

If local programming is truly valuable to consumers, some argue that the free market alone is sufficient to ensure that this content will be negotiated for and distributed to consumers who are willing to pay for it. Do you agree or disagree with this statement? Why or why not?

One of the reasons there is not a free market is that there are compulsory licenses that facilitate the carriage of local stations by MVPDs in local markets. Local-into-local is a win-win-win for stations, MVPDs and consumers.

Those that argue in favor of eliminating these local licenses in favor of a “free market” also propose eliminating the retransmission consent right, that is the right in the signal as opposed to the content, altogether. This would not create a free market; it would eviscerate a broadcaster's valuable right in its signal, effectively eliminating the market for that right. No one would seriously argue that cable or satellite should not be compensated for the infrastructure that assembles and distributes their service. Why are broadcasters any different?

Congress correctly established a framework where private market-based negotiations efficiently and fairly dictate the value of broadcasters' signals for those seeking to retransmit them for profit. For many years after 1992, broadcasters received almost no financial compensation.⁴ Even today, in a hyper competitive marketplace, the compensation that broadcast stations recover through retransmission consent fees are dwarfed by carriage fees paid to cable networks with far fewer viewers than local broadcast stations. In fact, broadcasters provide 35 percent of the viewing audience to MVPDs, but collect only three percent of the fees. Although this pricing disparity is deeply frustrating for television stations seeking fair market compensation, NAB is not asking the government to intervene. Quite the opposite, NAB firmly

³ http://www.rtdna.org/article/newsroom_staffing_stagnates#.UyhMN5Ta3V

⁴ See Navigant Economics, Jeffery A. Eisenach, Ph.D. and Kevin W. Caves, Ph.D., *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon*, at 5 (April 2010). This and other studies have discussed in detail why broadcasters' bargaining power relative to that of MVPDs has remained limited over time.

believes that the market is finding its equilibrium as prices for content are getting closer and closer to fair market values based on ratings and popularity.

Do you believe that any laws currently affecting the video marketplace are unnecessarily creating higher costs for consumers?

Cable rates have grown at more than twice the rate of inflation since well before broadcasters were being paid a penny for our signals. While certain laws governing the video marketplace may contribute to these price increases, the retransmission consent right is not among them.

As NAB has demonstrated in multiple economic studies, retransmission consent is not responsible for the high and rising consumer prices charged by cable operators. An independent analysis from Multichannel News found that only two cents of every dollar of cable revenues go to broadcast retransmission consent fees, while 20 cents of every dollar go to cable programming fees, even though broadcast programs remain the most popular with viewers.⁵ Recent SNL Kagan data show that retransmission consent fees are equivalent to only 2.7 percent of the cable industry's video-only revenues (and would be a considerably smaller percentage of total revenues).⁶ Today, channels with lower ratings are being paid more than broadcast channels, so any attempt to point to retransmission consent as the reason cable bills are increasing has no basis in fact.

How valuable is local programming to your consumers? What steps, if any, should Congress take to ensure that consumers receive their local programming?

NAB urges the Committee to take a hard look at some consumer friendly provisions that would mitigate consumer disruptions caused by retransmission consent impasses.

First, Congress should prohibit MVPDs from assessing early termination fees on consumers who seek to switch pay-TV providers. It is becoming increasingly common for MVPDs to lock their subscribers into early termination agreements that force a consumer to pay hefty fees when canceling services prior to the termination of a service agreement. These substantial fees act as a strong deterrent in preventing consumers from switching to different pay-TV providers in the rare event of a retransmission consent carriage dispute.

Second, Congress should require MVPDs to refund subscribers for the costs associated with the loss of promised content.

Third, Congress should consider modifying rules to ensure that consumers have adequate information to make informed decisions about how to access programming in the rare instances when they may be impacted by a negotiating impasse. Existing rules that require written notification of a removal of any broadcast signal should be expanded to all MVPDs, not just

⁵ Where Your Cable Dollar Goes, Multichannel News (Mar. 28, 2011) at 10-11.

⁶ © 2013 SNL Kagan, a division of SNL Financial LC, estimates.

cable. Increased consumer notice and education to all pay-TV subscribers will provide viewers who may be affected by a rare impasse in a carriage negotiation with the ability to make informed choices about how to avoid or minimize potential disruptions.

Fourth, Congress should consider prohibiting MVPDs from charging consumers who wish to downgrade their service package.

In Northwest Iowa, many of my constituents are either in the Sioux City, Iowa DMA or the Sioux Falls, South Dakota DMA. Should cable or satellite providers be allowed to bring in a neighboring broadcaster's signal to better reflect the market demands of that area? Why or why not? Some argue that the marketplace would be better served if consumers had more choice as to which broadcast signal they could receive – do you agree?

Local broadcasters' primary goal is to promote localism. While the DMA structure created by Nielsen is not perfect, the FCC studied the availability of in-state programming following STELA's enactment. Specifically, based on FCC data from 2010, 99.98 percent of the 117.2 million total U.S. households have access to in-state programming (at least one station) either over the air or via an MVPD. With that, broadcasters are committed to serving the public and delivering their signal to viewers, and in examples where MVPDs serving consumers outside a DMA seek to obtain an in-state station, many broadcasters have engaged in productive discussions to arrange carriage of in-state news and public affairs programming in the private marketplace. Unfortunately, in many instances MVPDs, specifically DISH and DirecTV, have refused to enter into these private agreements to provide in-state programming to their consumers.

The better approach is to pursue a marketplace solution, and NAB commits to work with you to determine whether viewers in the Iowa counties you reference are not currently served by locally-focused programming. In the event that is deemed to be the case, there are several examples throughout the country where local broadcasters have committed to provide their non-duplicative, in-state news and weather to counties that are not otherwise served by in-state locally focused programming.

Finally, consumers benefit from the current legal framework that ensures that the vast majority of viewers receive their local broadcast stations. No changes to the law should be considered that undermine broadcasting's locally-focused service.

In Iowa, many consumers aren't able to receive the broadcaster's digital signal because the consumer lives outside of the broadcaster's digital contour. So, if not for a cable TV provider, a satellite provider or the consumer installing a 30 foot antenna outside their home, the consumer wouldn't be able to receive "free" over the air broadcast news. Should all broadcasters be mandated to serve their entire DMA footprint with a digital signal? In areas where it's technically not feasible, should cable TV companies and satellite companies be required to pay for the signal through the retransmission consent regime?

Broadcasters should not be “mandated” to serve their entire DMA any more than the government should “mandate” the coverage of a satellite carrier’s spot beam or the franchise area a cable system must serve. Moreover, there are often technical and interference reasons that preclude a station from providing coverage throughout its DMA. So as a practical matter, in many instances it is the government, through limitations on a station’s power and antenna height that is “mandating” that it not provide coverage throughout its DMA.

Consumers are best served when they receive a local broadcast signal rather than a distant signal. It is only in those cases that viewers received the locally-focused news, weather, emergency service, sports and public affairs programming that make broadcast television unique among entertainment mediums. Congress should resist proposed changes in law that would undermine this local focus.

Current law enables satellite companies to import distant network signals to certain “unserved households” without obtaining retransmission consent for those signals.